

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

3 | COMODO HOLDINGS LIMITED,

4 Petitioner, CIVIL ACTION NUMBER:

5 v. 2:18-cv-13755-JMV

6 DAVID UNTRACHT, Motion Hearing

7 | Respondent.

COMODO HOLDINGS LIMITED,

Petitioner, CIVIL ACTION NUMBER:

v. 2:19-cv-436-JMV

2 WILLIAM GIARUSO and Motion Hearing
TD BANK, N.A.

3 | Respondents .

Frank R. Lautenberg Post Office and Courthouse
Two Federal Square
Newark, New Jersey 07101
May 28, 2019
Commencing at 11:00 a.m.

B E F O R E: THE HONORABLE JOHN MICHAEL VAZQUEZ,
UNITED STATES DISTRICT JUDGE

19 | A P P E A R A N C E S:

20 LOWENSTEIN SANDLER LLP, BY:
MATTHEW M. OLIVER, ESQ.
21 JARRETT R. SCHINDLER, ESQ.
One Lowenstein Drive
22 Roseland, New Jersey 07068

23 appeared on behalf of the Petitioner,
Comodo Holdings Limited;

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1 A P P E A R A N C E S: (Cont'd.)

2 QUINN EMANUEL, BY:
3 CHRISTOPHER D. KERCHER, ESQ.
3 LAUREN ANN VALLE, ESQ.
3 MOLLY K. WEBSTER, ESQ.
4 51 Madison Avenue, 22nd Floor
5 New York, New York 10010

5 appeared on behalf of Joseph Katz, as Executor
6 for the Estate of Eric D. Emanuel, deceased.

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1 (PROCEEDINGS held in open court before The
2 HONORABLE JOHN MICHAEL VAZQUEZ, United States
3 District Judge, on May 28, 2019.)

4 THE DEPUTY CLERK: All rise.

5 THE COURT: Thank you. Please be seated.

6 We're on the record in two matters. They're both
7 entitled In Re Application of Comodo Holdings Limited. The
8 first docket number is 18-13755. The second docket number is
9 19-436.

10 Can I please have the appearances of counsel.

11 MR. OLIVER: Good morning, Your Honor. My name is
12 Matthew Oliver. I'm with the law firm of Lowenstein Sandler
13 LLP on behalf of the applicant, Comodo Holdings Limited.

14 THE COURT: Good morning.

15 MR. OLIVER: Good morning, Judge.

16 MR. SCHINDLER: Good morning, Your Honor. Jarrett
17 Schindler, also on behalf of the plaintiff.

18 THE COURT: Good morning.

19 MS. VALLE: Good morning, Your Honor, Lauren Valle.
20 I'm here with Molly Webster and Christopher Kercher on behalf
21 of Joseph Katz as the executor of the Estate of Eric Emanuel.

22 THE COURT: Good morning, Counsel.

23 MR. KERCHER: Good morning, Your Honor.

24 THE COURT: Both matters concern the application of
25 28 U.S.C. Section 1782, and there's a total of three subpoenas

1 at issue.

2 In the first, Docket No. 18-13755, it is a subpoena to
3 an accountant, and there are two subpoenas at issue in 19-436;
4 one to Commerce Bank, formerly TD Bank, and also one to an
5 individual by the name of Mr. Giarusso, G-I-A-R-U-S-S-O.

6 Before we get into argument, I wanted to review the
7 applicable law as I've read it because the parties do agree on
8 the elements and the factors to consider, but there is some
9 disagreement as to how courts have interpreted some of the
10 legal requirements.

11 So under 28 U.S.C. Section 1782, there are three
12 elements that are required:

13 The person from whom discovery is sought resides or is
14 found in the district where the action has been filed. That
15 would be the district of New Jersey. I have not seen an
16 indication that any of the three parties sought to be
17 subpoenaed are not in the district.

18 The second requirement is that the discovery sought is
19 for use in a proceeding before a foreign tribunal. The
20 estate -- Mr. Katz, as executor of the Estate, does take issue
21 with this element as to the second two subpoenas to the bank
22 and to the individual.

23 Then, finally, the application must be made by a
24 foreign or international tribunal or any interested person.
25 Again, I did not see that element being at issue in this case.

1 Pursuant to Supreme Court precedent under the Intel
2 factors, the Supreme Court has made clear that this is a
3 discretionary decision for the Court and has laid out certain
4 factors for the Court to consider in whether to exercise the
5 discretion in favor of or against an application.

6 First is whether the person from whom discovery is
7 sought is a participant in a foreign proceeding so that
8 discovery is accessible without the aid of Section 1782, the
9 nature of the foreign tribunal, the character of the foreign
10 proceedings, and the receptivity of the foreign government or
11 court to accept U.S. Federal Court assistance.

12 Third, whether Section 1782 request conceals an attempt
13 to circumvent foreign proof-gathering restrictions, and then,
14 finally, whether a subpoena is unduly burdensome.

15 As I noted, the *Intel* court case is a leading case on
16 the exercise of discretion. The parties have cited it at
17 length. It can be found at 542 U.S. 241.

18 Briefly, the Supreme Court then emphasized that 1782
19 authorizes but does not require a Federal Court to provide
20 assistance. It also went on to say that interested persons
21 can extend beyond just litigants.

22 As I indicated, it does not seem to be an issue here
23 because Comodo Holdings is a litigant in the underlying BVI,
24 British Virgin Islands, action.

25 Tribunal extends beyond just foreign courts to also

1 quasi-judicial agencies. Again, that does not seem to be an
2 issue here because this matter is being litigated in the BVI
3 courts.

4 One of the key holdings -- and the parties do litigate
5 this issue -- is the Supreme Court rejected a foreign
6 discoverability rule. They noted that the plain language of
7 1782 protects privileged information but didn't go so far as
8 to say that the information has to be subject to foreign
9 discovery.

10 Among other cases cited by the parties is the *Esschem*
11 case, E-S-S-C-H-E-M, 390 Fed.Appx. 88, a Third Circuit case
12 out of 2010. The underlying case was in Germany over
13 misappropriation of trade secrets.

14 In that case the German civil procedure did not offer a
15 mechanism for general pre-trial discovery as we have in the
16 United States. Critically, for example, a party could not get
17 a document unless the party provided information specifically
18 about the document which really put the party in a Catch-22
19 because if they had that specific information, then normally
20 they would have the document itself.

21 But that did not provide a roadblock to the party
22 seeking relief under 1782. Among other things, the Third
23 Circuit said there was no indication that the German court
24 would not permit the evidence from the United States to be
25 used.

1 To the contrary. The German court at that point had
2 postponed the proceeding to see if the information could be
3 obtained in the United States.

4 The parties also cite to the *Lazaridis*,
5 L-A-Z-A-R-I-D-I-S, case which is out of this district in 2011,
6 865 F.Supp.2d 521. There the court did grant the motion to
7 quash a subpoena finding that it was unduly burdensome, it was
8 extremely broad and unconstrained by time, and there was also
9 a lack of clear relevance.

10 Another case cited by the parties is the *Rivada*
11 *Networks* case, R-I-V-A-D-A, out of the Eastern District of
12 Virginia in 2017, 230 F.Supp.3d 467.

13 Among other things, the *Rivada* court found that the
14 party opposing the subpoena did have standing because they
15 could demonstrate an injury in fact because the other side --
16 who was seeking the use of 1782 -- any information they would
17 obtain could be used against a party, so that would sustain an
18 injury in fact.

19 The injury was fairly traceable to the 1782
20 conduct. The injury was likely to be redressed by a favorable
21 judicial decision because it would permit the party to
22 question a witness at a deposition as well as review
23 subpoenaed documents.

24 Similarly, the court found that the party could
25 intervene finding that it was well settled that a party

1 against whom information is going to be used has standing to
2 challenge under 1782 and the Federal Rules of Civil Procedure
3 citing to the then Judge -- before she was Justice -- Ginsburg
4 decision in the D.C. circuit in 1989.

5 As to Rule 24, the court found that there was no
6 doubt that Rule 24(b) applied and probably 24(a). The court
7 also noted because in the first application here under the
8 Docket No. 18-13755 that it's often done by ex parte, and in
9 Footnote 9 collected the cases that permitted it but noted
10 there were protections as to why it was permitted ex parte.

11 For example, under Rule 45 and other pertinent
12 rules, there would be notice to each party to the action
13 before the subpoena is served on any third party. That is
14 what occurred here.

15 Finally, there the court decided that the party
16 could participate in a deposition and review the subpoenaed
17 documents.

18 Just two more cases before we get to the argument.
19 Another case widely cited by the parties is the *California*
20 *State Teacher's Retirement System* case out of this district,
21 it was Judge Chesler, in 2017. Again, that was another German
22 suit for securities fraud.

23 The court, among other cases, relied upon the
24 O'Keeffe decision. That's O, apostrophe, K-E-E-F-F-E, out
25 of the Third Circuit 2016, another Federal Appendix case

1 646 F.Appx. 263.

2 Among other things, the court indicated that even
3 though the American company of Volkswagen was not a party to
4 the German suit, the plaintiffs did seek documents in the
5 United States and the German civil procedure did not permit
6 general pre-trial discovery. As I've already indicated, you
7 need to make very specific requests for documents before
8 you're able to obtain them.

9 The court also found that as to circumventing
10 foreign proof-gathering restrictions the German courts often
11 welcome United States evidence as part of their proceedings
12 and, as was indicated, there's no exhaustion or
13 quasi-exhaustion requirement.

14 In other words, a party does not have to seek aid
15 in the foreign tribunal first before invoking 1782.

16 As to Intel factor four, whether the request is
17 unduly intrusive or burdensome, the court says we essentially
18 follow Rule 26 and Rule 45 of the Federal Rules of Civil
19 Procedure when conducting that analysis.

20 Finally, what's been referred to as the
21 International case because that was the name of one of the
22 parties, it's an In Re Application For Discovery and Use in
23 Foreign Proceedings 2019 case by Judge McNulty out of this
24 district.

25 The underlying case there was a Brazilian action.

1 Judge McNulty did a thorough review of the law. As to whether
2 you're a participant in a foreign proceeding, he indicated it
3 means whether a foreign tribunal has authority over a party.
4 It does not mean that you have to review a foreign tribunal's
5 law as to discovery or otherwise.

6 One of the issues is that the courts have been
7 clear in the United States that this procedure is not meant to
8 have U.S. courts attempting to interpret foreign law.

9 As to the second *Intel* factor, which is also
10 raised here, whether a foreign tribunal is receptive to
11 United States evidence, Judge McNulty indicated that the
12 parties indicating that the foreign tribunal would not be
13 receptive to the United States evidence needs to show
14 authoritative proof that a foreign tribunal would reject
15 evidence obtained by way of 1782.

16 That comes from either the foreign country's
17 judicial, executive, or legislative declarations. And
18 international treaties can tip in favor of receptivity.

19 Critically it does not mean an admissibility
20 standard in a foreign court. Again, the United States courts
21 have warned United States judges not to tread into those
22 areas. It's just general receptivity, not admissibility.

23 Again, he also relied upon the *O'Keeffe* case as
24 did Judge Chesler. He also reiterated there is no foreign
25 exhaustion requirement, and he also reiterated that the fourth

1 Intel factor follows the same analysis under Rule 26 and
2 Rule 45.

3 So turning first to the subpoena on Mr. Untracht,
4 U-N-T-R-A-C-H-T, we'll deal with the 18-13755 case first. The
5 case here was filed in the BVI in 2013.

6 It appears first that the Estate -- Mr. Emanuel
7 passed away in approximately 2006. His Estate first went to
8 confirm the shares to an arbitration and in response Comodo
9 filed suit in the BVI against Renaissance, which was
10 Mr. Emanuel's company, and against Mr. Katz who is the
11 executor for Mr. Emanuel.

12 There was ex parte application at Docket Entry 1
13 on September 11th of 2018; Docket Entry 2, on October 11,
14 2018, I granted it. At the time the information presented
15 from Comodo Holdings appeared to be there were tax returns in
16 Mr. Untracht's possession as well as one box of documents
17 based on the information provided from the Estate's BVI
18 counsel.

19 Once the parties started communicating directly
20 with Mr. Untracht here in the United States, it turned out
21 that there was a lot more potential information, over 20 boxes
22 of documents. I believe 4 of which Comodo has indicated they
23 would like to review.

24 So the parties -- I have the Estate's motion to
25 intervene -- re-open the matter, leave to intervene,

1 participate in discovery at Docket Entry 3. Docket Entry 6
2 is Comodo's opposition, the reply filed on January 2nd of 2019
3 by Comodo, and then the estate filed at Docket Entry 11 a
4 supplemental letter with a BVI ruling in April of this year
5 2019 followed up by an opposition letter at Docket Entry 12.

6 Let me hear -- first before we again, I just want
7 to let the parties know that unfortunately in this district we
8 have a high, high number of judicial vacancies, which means
9 our docket is very -- each individual judge's docket is very
10 extensive.

11 I know that the current trial date in the BVI
12 action is scheduled for June 25th of 2019. Going forward, if
13 you ever need immediate attention to a matter because you're
14 running up on another trial date, I would say the best
15 practice is after you file the motion just file a letter
16 indicating this is time sensitive due to another matter and
17 then follow up with a telephone call to the law clerk.

18 I'll do my very best, despite the docket that we
19 have, to rule on it quicker. It's just that when we have so
20 many motions pending, unless somebody highlights it for us,
21 we're probably not going to pick it up right away that there's
22 another trial date pending in a foreign jurisdiction.

23 So let me hear first -- my inclination, as I
24 indicated on the phone last week and having read all the
25 papers, is to grant the leave to re-open, to grant leave to

1 intervene.

2 I know that Comodo has concerns that the Estate
3 waited too long because initially, based on the correspondence
4 attached through e-mails, Comodo believed the Estate was
5 participating in the process with Mr. Untracht but then about
6 two months later filed the current motion.

7 That being said, while I understand there's a
8 concern, most of the cases that I've read indicate that if you
9 do it within a few months it's still going to be timely.

10 Obviously, I agree with Comodo that it could have
11 been sooner. I also agree with the Estate that Comodo's
12 application could have been sooner.

13 I'm inclined to permit the Estate -- to grant the
14 motion to re-open, the leave to intervene, and then get to the
15 merits of the subpoena.

16 Let me hear first from the Estate because -- well,
17 if you want to go first, Mr. Oliver, you can do so.

18 MR. OLIVER: Sure. Thanks, Judge. I think I may be
19 able to cut through a couple of issues, as well.

20 THE COURT: Okay.

21 MR. OLIVER: First of all, I want to thank Your Honor
22 for bringing this in so quickly. We really appreciate it.

23 I also want to let Your Honor know we heard you
24 loud and clear from the conference call about making some
25 good-faith attempts to resolve this which we endeavored to do.

1 Unfortunately, that didn't work out.

2 Notwithstanding that, Judge, we are prepared to consent
3 to intervention in the Untracht case. We're prepared to
4 withdraw the subpoena to Mr. Giarusso.

5 So, really, all I think Your Honor has to deal with
6 today is the subpoena to TD Bank and the subpoena to
7 Mr. Untracht. I hope that that narrows things a little bit.

8 So, Your Honor, with respect to the subpoena to
9 Mr. Untracht, you know, Your Honor had indicated on the call
10 that you were initially inclined to allow production of the
11 tax returns for a certain period of time. We appreciate that.
12 We certainly think that's proper.

13 However, we don't think that goes quite far enough,
14 and I'll be happy to explain to Your Honor why that is.

15 Tax returns are really just a proxy for financial
16 status; right? Mr. Emanuel's financial status is what's key
17 at issue in the BVI action; his wealth, sources of income, his
18 assets, how he paid his bills, what he did with all the money
19 that he was taking in from people who intended to invest in
20 Comodo.

21 These are the key issues in the BVI case. That's why
22 the BVI judge granted Comodo's application to get Emanuel's
23 tax returns.

24 We've learned a lot in the months since we filed this
25 application. Among other things, after lengthy delay, the

1 Estate received and turned over to us information that they
2 got from the IRS indicating that the IRS no longer has any
3 copies of any tax returns filed by Mr. Emanuel.

4 I'm not sure what's in Mr. Untracht's files, but we
5 certainly know the IRS doesn't have any returns. So together
6 with that, Comodo followed up and filed an application in the
7 BVI seeking to compel the Estate to get Mr. Emanuel's New York
8 state tax returns because he was a New York resident during
9 the years in question.

10 The Estate consented to seek the New York state tax
11 returns for the years 1998 through 2006, and they received the
12 information and they turned it over to us. New York state
13 doesn't have tax returns for Mr. Emanuel but they do have tax
14 transcripts.

15 What they provided back showed that Mr. Emanuel had
16 filed New York returns in 1997 and 1998 but he hadn't filed
17 any tax returns with New York state for '96 or for '99 through
18 2006, the year he died. Moreover, the 1998 return showed
19 income of \$31,000.

20 What we have, Judge, is a case where the same person
21 who is representing himself to Comodo as being able to invest
22 tens of millions of dollars of his own money in the company is
23 making \$31,000 a year and then not filing returns for the last
24 chunk of his life.

25 So, you know, this is just the kind of person that

1 we're dealing with in the situation that we're in, Judge.
2 This is a supposedly wealthy, reputable Wall Street investment
3 banker with almost no income and -- you know, either zero
4 income, not enough to file returns, or he's evading income
5 taxes for a substantial period of time.

6 In addition, Judge, we've done a little digging
7 ourselves, and we found a couple of tax court cases that
8 Mr. Emanuel actually filed against the IRS in 2005. These are
9 documents that we obtained in the public record.

10 What they show is that as of April of 2005 Mr. Emanuel
11 had received two deficiency notices from the IRS for the
12 tax years 2000, 2002. Apparently his IRA custodian had
13 misclassified some kind of investment and forwarded some
14 documents to the IRS that triggered -- you know, that put him
15 on their radar.

16 What we learned from the tax case is that as of
17 April 2005 Emanuel had not filed returns for 2000 or for 2002.
18 We don't know about the other years.

19 He also resolved those cases for \$13,000 in one year
20 and \$686 in the other year indicating he either had almost no
21 income at all or he was not fully disclosing his income to the
22 IRS.

23 What the tax records also show, Judge, is that
24 Mr. Untracht was involved in those tax court cases. That's
25 another area that really sort of heightens our concern and

1 makes us very interested in seeing what is in Mr. Untracht's
2 files, Judge.

3 As I said, the key issues in the BVI action are
4 Mr. Emanuel's wealth, his use of funds, his assets, what he
5 did with the money, and how he treated the money that he was
6 taking in from people who intended to invest in Comodo.

7 You know, we believe Mr. Untracht has documents that
8 will shed light on these issues. He's identified one box that
9 he thought was the most relevant.

10 He's got an archive list with a bunch of stuff.
11 Four additional boxes, to us, looked potentially relevant, but
12 certainly the one box that he self-identified is really ripe
13 for discovery.

14 Mr. Untracht also told me he had e-mail correspondence
15 with Mr. Emanuel that's still on his system and he has
16 electronic documents, so we certainly want to make sure that
17 any discovery is very targeted.

18 We don't want to impose undo burdens on Mr. Untracht or
19 on the Estate but there's -- you know, there's enough of a
20 sort of nucleus of important information that we think
21 Mr. Untracht has and that we think we're entitled to get
22 access to.

23 Now, we think the information -- the documents that
24 Mr. Untracht has are going to shed light on all these issues.
25 We think the BVI court will want to hear this information at

1 trial.

2 If we're wrong about that and the BVI court has no
3 interest in it, then the BVI court will not admit it. There
4 will be no, you know, negative consequences for anybody.
5 That's the BVI court's decision to make.

6 I would also note, Judge, I have spoken to
7 Mr. Untracht. He has never had an objection since day one
8 from producing these documents. The objections are only
9 coming from the Estate.

10 Again, I said we consent to intervention. We do. But
11 I just want to give Your Honor a word about why we opposed
12 intervention in the first place.

13 It's not that we thought they took too long. What
14 happened here, Judge, is we served the subpoena, I spoke to
15 Mr. Untracht, I was working with the Estate's prior counsel on
16 a privilege review protocol, and then what happened, Judge, is
17 they went in and they looked at this box. They looked at this
18 box that Mr. Untracht has in his conference room and then
19 everything changed.

20 So that really put Comodo on high alert, Judge; right?
21 They were willing to go along with production, willing to turn
22 it over. Once they look at it, no, all bets are off. We're
23 going to fight this thing tooth and nail.

24 Judge, I'm concerned that there are documents in that
25 box that are highly material, that are really relevant to the

1 BVI case, and I think Comodo is entitled to them under the
2 factors that you laid out.

3 THE COURT: Let me just ask you, you want to just
4 rely on your papers as to TD Bank? I was going to do them
5 separately, but now that you've agreed to withdraw for
6 Mr. Giarusso, would you like to address the Commerce/TD Bank
7 issue?

8 MR. OLIVER: Yes.

9 MR. KERCHER: Your Honor, if I may just try to
10 simplify this, we'll actually consent to withdrawing our
11 opposition to the TD Bank subpoena just to make everyone's
12 life easier and save some words.

13 THE COURT: Okay. Great. So that means withdrawing
14 on Mr. Giarusso, no opposition on the Commerce Bank. That
15 will be entered.

16 So now I've heard from you as to Mr. Untracht's
17 documents. Let me hear from your adversary.

18 MR. OLIVER: Thank you, Your Honor.

19 THE COURT: Thank you.

20 MR. KERCHER: Thank you, Your Honor. Good morning.

21 I, too, appreciate Your Honor's time devoted to this matter
22 right after the holiday. I share with Mr. Oliver that we did
23 make good-faith efforts to try to resolve this last week --

24 THE COURT: I appreciate that.

25 MR. KERCHER: -- but unfortunately we couldn't.

1 THE COURT: I certainly get the sense that this is a
2 highly contested case.

3 MR. KERCHER: Just so you understand, I do want to
4 set the stage a little bit more because Mr. Oliver gave you a
5 slice of what the case in BVI is about. That's from their
6 perspective what the case is about, but I want you to
7 understand what the case is really about. Okay?

8 Mr. Emanuel was a business partner in this software
9 company called Comodo. At the time he died, it was still a
10 small start-up but he had close to half the company, half the
11 equity, either directly or through his fund Renaissance or a
12 third entity called Tech IP.

13 After he passed away, the managers of Comodo wiped him
14 off the shareholder registry, just deleted him. Okay. Since
15 that time they have done everything they can to obfuscate and
16 delay and make sure that the day of reckoning never comes
17 because they're spending Comodo's money, which if we're right
18 is actually half or somewhere around there of Mr. Emanuel's
19 money.

20 We think these 1782 applications, these three as well
21 as one that was filed early 2019 in Florida, are all part of
22 that delay strategy. I'll get to this because it's core to
23 the *Intel* factors.

24 The case isn't really about whether Mr. Emanuel is a
25 man of wealth. That's the defense they have come up with to

1 justify stealing like a billion dollars or hundreds of
2 millions of dollars worth of shares.

3 The case is really about whether or not he was a
4 shareholder. Whether or not he as a merchant banker made a
5 certain amount of income in any given year is not dispositive
6 of whether he could go out and raise capital from other people
7 for this entity Renaissance.

8 If there's a dispute among Renaissance shareholders,
9 that's not Comodo's to pick up. But that's their defense.
10 That's what's going on at BVI.

11 I don't want Your Honor to have a misperception that
12 this case is about Mr. Emanuel's wealth.

13 Let me turn to the 1782 with respect to Mr. Untracht.
14 This is key. There are two *Intel* factors I think that really
15 matter here.

16 The first is a circumvention venture factor. Okay?
17 Rarely do you see a case where the circumvention is this
18 clear.

19 My friends at Comodo in the BVI went to the BVI court
20 with, among other requests, two. The first one was: We want
21 the tax returns from '98 to '02, four tax returns.

22 BVI court said approved. It's in the transcript we
23 provided to you.

24 The next request was: And we want the box.

25 BVI court, not approved. Having been rejected by the

1 BVI court, it's interesting to come to this court to ask for
2 that same box and say the BVI court can sort it out. That
3 goes core to circumvention.

4 The next prong that I think is totally relevant here is
5 receptivity. Again, rarely do you see a court, especially
6 using, sort of, the English manner that English court's write
7 in, when you read that decision, that's a decision about
8 whether to permit -- and this is attached to our letter and
9 previous letter. It was a decision about whether to admit an
10 amendment of Comodo's complaint.

11 The court in that decision in paragraph 81 went out of
12 its way -- okay, this wasn't before the court. It went out of
13 its way to note that it seems that Comodo has been engaged on
14 an evidence-gathering exercise in the U.S.

15 It said with respect to that it would be prejudicial
16 at this late stage to be embarking on a further round of
17 evidence. It could threaten the trial date, which both
18 parties say they have no intention of doing, but it's not
19 inconceivable that applications will be mounted on the back of
20 my grant of permission to amend for disclosure and other
21 evidence.

22 So what the BVI court I think is telling us about as
23 clearly as it can is this is going to open a mess for me. If
24 I all the sudden get all this new evidence going back years,
25 the '90s, early 2000s, dumped on me, who knows where it leads.

1 Maybe the evidence is good for Comodo; maybe the
2 evidence is good for Mr. Emanuel. Frankly, it's probably a
3 little bit of A, a little bit of B. Does lead to requests
4 now? We need to depose this person and now we need to go
5 chase this bank.

6 You're just opening a Pandora's box. At some point
7 there needs to be a finality.

8 The BVI court is saying: We've got to keep this trial
9 date. We're not moving this trial date. Embarking on a
10 further round of evidence is only going to make my life a lot
11 harder.

12 Respectfully, Your Honor, I think those two *Intel*
13 factors rarely do you see cases where so clearly you have a
14 circumvention of a foreign discovery ruling and so clearly
15 commentary by the foreign court about receptivity.

16 THE COURT: Thank you.

17 MR. KERCHER: Thank you, Your Honor.

18 THE COURT: Thank you.

19 Would you like to reply?

20 MR. OLIVER: Very briefly, Judge.

21 THE COURT: Sure.

22 MR. OLIVER: Thank you. Two quick points. With
23 respect to counsel's argument about circumvention, there's no
24 attempt at circumvention here.

25 Judge, we have learned significant facts about

1 Mr. Emanuel's tax return practices since we were last before
2 the BVI court. I think this is a very different scenario we
3 have now.

4 As I indicated previously, tax returns are a proxy for
5 financial status, and the BVI judge assumed that tax returns
6 would have been filed given what the Estate had been saying
7 about Mr. Emanuel's reputation and career and everything else.

8 With respect to the receptivity argument, there's been
9 no delay here by Comodo. Comodo is not seeking to delay.
10 Comodo has been seeking to press forward on all these
11 applications specifically so the BVI trial will go off as
12 scheduled.

13 Moreover, you have our position in the letter with
14 respect to the denial of the amendment application, but I'd
15 just point out, Judge, the judge who decided that case is not
16 the trial judge. You know, we shouldn't infer what the trial
17 court might do and say from that opinion, you know,
18 necessarily.

19 Thank you, Your Honor.

20 THE COURT: Thank you. I'm really ruling on the
21 subpoena to Mr. Untracht, and I appreciate the parties'
22 efforts.

23 Comodo has withdrawn the request for the subpoena to
24 Mr. Giarusso, and the Estate has agreed not to oppose the
25 subpoena to Commerce Bank, so I will enter an order

1 accordingly on those two issues in the Docket No. 19-436,
2 which leaves me to determine the correct decision in
3 Docket No. 18-13755.

4 Just for purposes of the record, I have read the
5 opinion that counsel just addressed from the BVI. It was
6 attached to both supplemental letters in both of the matters
7 currently before the Court. The opinion itself is over
8 31 pages, and it was issued in April of this year.

9 There were two comments that the Estate pointed the
10 Court to. One was in paragraph No. 2 of what's entitled "The
11 Judgment" about the odd thing about the application is the
12 timing of it -- I'm going to paraphrase -- in light of the
13 trial date.

14 Then in paragraph 81, which really was the focus of the
15 Estate's argument, concerning prejudice to the defendants if
16 amendments are allowed, again, that was amending the actual
17 pleading, from my understanding, but it does certainly mix
18 with the current issues before the Court.

19 The court in the BVI said: While I agree with
20 Mr. Francis that the extent of the prejudice asserted by
21 defendants is probably exaggerated, it seems that Comodo has
22 been engaged on an evidence-gathering exercise in the U.S.
23 partly to try to obtain further evidence to support its case
24 as to the role of Renaissance.

25 I do not see why the defendant should not also be

1 entitled to fully explore the issue of Renaissance's role by
2 seeking evidence from other investors who obtained their
3 shares through the defendants.

4 The amendments bring this point sharply into focus, and
5 so it would be prejudicial at this late stage to be embarking
6 on a further round of evidence. It could threaten the trial
7 date, which both parties say they have no intention of doing,
8 but it is not inconceivable that applications would be mounted
9 on the back of my grant of permission to amend for disclosure
10 or other evidence.

11 So the concern certainly was as to amending. I'm go to
12 use the word "leading," and it's a different terminology used
13 in the BVI. And that may not be the correct analogy in the
14 United States courts, but the court certainly expressed its
15 concerns.

16 Again, turning to the relevant background as to this
17 particular issue, David Untracht, who we have been talking
18 about, was, among other things, an accountant for Mr. Emanuel
19 when Mr. Emanuel was alive.

20 Initially in December of 2017, the BVI court ordered
21 that Mr. Emanuel's tax returns from 1998 through 2002 be
22 produced if located and produced by Mr. Untracht and a
23 February of 2018 order denying the request by Comodo
24 that Mr. Katz as the executor of the Estate serve an affidavit
25 as to the contents of the box and disclose any relevant data.

1 Unfortunately, the court -- while it's clear the court
2 denied their request, I'm assuming just due to the nature of
3 the request the court was dealing with did not provide an
4 explanation as to why it was denying the request.

5 I do agree that upon that denial it would have behooved
6 Comodo -- or even before that, because there is no foreign
7 exhaustion requirement, it would have behooved Comodo to file
8 an application under 1782 instead of waiting several months.

9 But, as I said, both parties could have moved somewhat
10 quicker as to this particular application, but I'm not finding
11 any undo delay to deny the application.

12 I am concerned about the trial in the British Virgin
13 Islands. It's now scheduled for June 25 of 2019. None of my
14 rulings today intend to interfere with that trial date.
15 That's, first of all, solely within the purview of the BVI
16 court.

17 I would never want to overstep my bounds to indicate in
18 any manner that I could affect the trial date, but at the same
19 time I want to make it clear that I certainly respect the BVI
20 courts and their decisions as to how to control their docket,
21 and I do not want to do anything -- anything I say or do to
22 indicate that I am suggesting that the trial date needs to be
23 moved. That's solely within the purview of the BVI court.

24 When looking at the issues, the first factor -- these
25 are the elements that I must decide, and that's the person

1 from whom discovery sought resides or is found in this
2 district. Again, it doesn't appear there's any dispute that
3 that applies to Mr. Untracht.

4 That the discovery sought is for use in a proceeding
5 before in a foreign tribunal. It doesn't appear as though
6 that's hotly disputed, either, that this information from
7 Mr. Untracht would be for use.

8 Again, I'm not passing on either party's theory of the
9 case. I know that Comodo has a theory that Mr. Emanuel did a
10 few things they thought were inappropriate, that he issued
11 shares of Renaissance instead of Comodo or when he did give
12 shares of Comodo he did not give the full amount of shares
13 that would equate to the value he received, but I understand
14 that's just a theory.

15 At the same time, I understand the Estate's position
16 which is really this is going to be an issue among the
17 shareholders as to who owns what of Comodo shares.

18 I'm not passing on the merits, but I need to look at
19 those theories to determine whether it's appropriately sought
20 in this case under Section 1782.

21 Certainly, Comodo does fit the position of being an
22 interested person. They are a litigant in the underlying BVI
23 action.

24 As to the discretionary factors, first is whether the
25 person from whom discovery is sought is a participant in the

1 foreign proceedings so that discovery is accessible without
2 the aid of Section 1782.

3 The Estate is a litigant in the underlying action.

4 Even though it's being litigated in the BVI, it does seem as
5 though that the BVI could order persons before it as litigants
6 to produce certain information within their possession,
7 custody, or control regardless of where in the world that
8 information resides.

9 The nature of the foreign tribunal, the character of
10 the foreign proceedings, and the receptivity of the foreign
11 government to accept U.S. Federal Court assistance, on that
12 general issue I have not seen any information that the BVI
13 courts would not be receptive to U.S. Federal Court
14 assistance. Again, with the understanding that this Court is
15 not looking to interfere with the BVI court's proceedings.

16 Whether a request conceals an attempt to circumvent
17 foreign proof-gathering restrictions and whether the subpoena
18 is unduly burdensome, turning to the second factor, unduly
19 burdensome, I have not seen any indication from Mr. Untracht
20 that he finds it unduly burdensome to produce information.

21 It does seem as though there is a much larger amount of
22 information available than originally first thought when the
23 subpoena was sought. At that point it was certain years' tax
24 returns and one box of documents. It turns out that he has
25 over 20 boxes of documents that may be responsive.

1 Does it attempt to circumvent foreign proof-gathering
2 restrictions? It's certainly true that the BVI court denied
3 the request from Comodo to order Mr. Katz to produce that
4 information, and it's also true that there was a recent
5 expression that there were concerns about the trial date in
6 light of the information being sought.

7 But at the same time, there was no reasoning behind it,
8 and using the German courts by way of analogy, even if it
9 can't be sought -- and that was one of the issues I asked the
10 Estate to address in that in the BVI at least the Estate
11 seemed to believe that they would not be in constructive
12 possession of Mr. Untracht's documents in the BVI, but there
13 is certainly a good-faith argument that they would be in
14 constructive possession as to at least certain of the
15 documents.

16 Again, those would be documents Mr. Emanuel
17 provided directly to Mr. Untracht and any filings done on
18 Mr. Untracht's behalf. I'm not saying all of the information
19 would be in their constructive possession.

20 I think it would be akin to an attorney work product
21 issue where there might be work papers from Mr. Untracht that
22 are his documents. They may be discoverable, but it doesn't
23 mean the Estate would necessarily have a right to those
24 documents.

25 But there is a difference, apparently, between the

1 United States law and the foreign law on this particular
2 issue.

3 Outside of trial date concerns, there has not been an
4 indication that the BVI court will legally prohibit any
5 evidence gained in the United States to be used in that
6 proceeding.

7 Of course the court has its discretion, I assume, and
8 it may find that due to timing it may not permit it, but
9 there's no legal prohibition to permit evidence gathered in
10 the United States to be used in the BVI proceeding.

11 Again, in analyzing the factors, what I'm going to
12 conclude at this time using my discretion is the following as
13 to the subpoena on Mr. Untracht. I say this with the
14 following consideration in mind:

15 I will narrow the subpoena to produce the tax returns
16 that have previously been ordered by the BVI court. That's
17 the 1998 through 2002 tax returns of Mr. Emanuel. Again, if
18 Mr. Untracht is actually in possession of those documents.

19 As indicated, it appears that -- well, 1996 would be
20 outside the scope, but between 1999 and 2006 there were no
21 returns. At least that's according to -- I'm sorry. That's
22 the New York state tax returns.

23 As to the IRS, I do not know if there were tax returns,
24 but to the extent there were tax returns between 1998 and
25 2002, I will permit the subpoena for that information.

1 I will permit the subpoena to extend to the one box of
2 documents that was previously identified, and I will certainly
3 give the Estate an opportunity to review that box first for
4 privileged materials if they believe any privileged materials
5 exist within that box before producing it.

6 My hope is that given this limited quantum of
7 information, the one box and several years of tax returns, it
8 will not impact the trial date. I will say, though, if the
9 trial date does get moved, I will entertain an additional
10 application under 1782 from Comodo to see if they want to seek
11 additional information from Mr. Untracht because it does
12 appear this information clearly meets the United States
13 federal standard that it's reasonably calculated to lead to
14 the production of admissible evidence or discovery of
15 admissible evidence.

16 At the same time maybe -- well, I shouldn't speculate,
17 but the speculation would be because the BVI courts have
18 a different view on constructive possession than the
19 United States courts that certainly could have impacted their
20 decision.

21 But my understanding -- and I appreciate the
22 supplemental briefing from the Estate. While they're not
23 100 percent clear, they do think at least under New Jersey law
24 there is constructive possession as to certain documents.

25 If that understanding was clear, I don't see why the

1 BVI court would have had ordered if it was produced by
2 Mr. Untracht. The better order would have been to order the
3 Estate to produce the documents that it was in constructive
4 possession of.

5 So I will narrow the subpoena in that regard. It will
6 be to the one box. I am going to refer to the box by way of
7 the e-mail that the BVI counsel did so that -- I think that's
8 the best description I have at this time and as to those
9 years' tax returns.

10 If the trial date does get moved again, I will also
11 note in my order that it's not the intention of this Court to
12 affect the trial court date. I'm trying to make a decision so
13 that it's a limited realm of information that hopefully can be
14 reviewed and produced within a few weeks, hopefully two weeks,
15 so as to not delay the trial date.

16 Then, of course, the admissibility is up to the BVI
17 court. I do not know if the BVI court, even if it might
18 otherwise find it admissible, will permit it at this stage;
19 but that will be an issue for our courts in the BVI.

20 Is there anything else on behalf of Comodo?

21 MR. OLIVER: Just very briefly, Judge. You indicated
22 a two-week time frame for production of the materials. I
23 guess I was just wondering is your order going to have a date?

24 I would request that it be, I guess, the Friday after
25 this Friday. That might be a little tighter than two weeks,

1 but we really are under intense time pressure for the BVI
2 case.

3 THE COURT: Sure. I can put a return date down on
4 the production from a week from this Friday, and that will
5 give the Estate not quite two weeks obviously but over 10 days
6 to review the documents.

7 If there's any privileged information, they can do a
8 privileged log for you and then you can produce it. Okay?

9 MR. OLIVER: Thank you, Your Honor.

10 THE COURT: As I indicated, Counsel, I know this has
11 been hard fought. I know counsel here has not been fighting
12 it in the BVI.

13 I also understand if the trial date gets moved the
14 Estate may be in a position where they want information here
15 in the United States, so I'm making these final rulings
16 without prejudice.

17 If the trial date holds, it holds. If it doesn't and
18 the parties believe they need additional information, just
19 please file it as a related case to these two cases because
20 then I'll be familiar with the facts and we won't have to
21 start from scratch with a new judge.

22 MR. KERCHER: Understood.

23 THE COURT: Okay. Again, Counsel, given where we are
24 unfortunately with our judicial vacancies, if you're ever in a
25 position where it's not going to be on the normal motion

1 track, just please file that or contact the clerk, and I'll do
2 my best to get on it right away.

3 MR. OLIVER: Appreciate that, Judge.

4 THE COURT: Thank you, Counsel.

5 MR. KERCHER: Thank you.

6 (Which were all the proceedings had in
7 the foregoing matter on said day.)

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1 FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

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3 I, **Lisa A. Larsen, RPR, RMR, CRR, FCRR**, Official Court
4 Reporter of the United States District Court for the District
5 of New Jersey, do hereby certify that the foregoing
6 proceedings are a true and accurate transcript of the
7 testimony as taken stenographically by and before me at the
8 time, place, and on the date hereinbefore set forth.

9 I further certify that I am neither related to any of the
10 parties by blood or marriage, nor do I have any interest in
11 the outcome of the above matter.

12

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15 /S/Lisa A. Larsen, RPR, RMR, CRR, FCRR,

16 Official U.S. District Court Reporter

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18 DATED this May 30, 2019 ~

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